

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

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|---------------------------------|---|---------------------------------|
| MICHELLE BICE GILLESPIE, | : | |
| | : | C.A. No: K10A-06-007 RBY |
| Appellant, | : | |
| | : | |
| v. | : | |
| | : | |
| DELAWARE BOARD OF | : | |
| NURSING, | : | |
| | : | |
| Appellee. | : | |

Submitted: August 12, 2011
Decided: November 17, 2011

*Upon Consideration of Appellant's
Appeal of the Decision of
The Delaware Board of Nursing*
REVERSED

P. Scott Wilson, Esq., Dover, Delaware for Appellant.

Barbara J. Gadbois, Esq., Wilmington, Delaware for Appellee.

Young, J.

SUMMARY

Michele Gillespie appeals the Delaware Board of Nursing's decision to suspend her nursing license. The Board erred in its application of 16 *Del. C.* § 903. Absent a violation of § 903, the record lacks substantial evidence to support the Board's finding. The decision below is **REVERSED**.

FACTS

Michelle Gillespie (Appellant) is a registered nurse and an advanced practice nurse in Dover, Delaware. Pursuant to 24 *Del. C.* § 1922(a)(8), the Delaware Board of Nursing (the Board) suspended Appellant's nursing license for two years beginning on May 12, 2010. The Board ordered that Appellant undergo continuing education classes prior to her reinstatement.

In January 2010, the State filed a complaint with the Board alleging that Appellant was guilty of unprofessional conduct. Specifically, the complaint alleged that Appellant knowingly failed to report "several incidents of sexual abuse inflicted by two young boys on three younger children" to the children's parents and/or any authority enumerated in 16 *Del. C.* § 903.

A hearing was conducted on March 29, 2010. The parties stipulated to the facts alleged in paragraphs one, two, three, five, seven and eight of the complaint. The remaining paragraphs were withdrawn. Accordingly, Appellant admitted that she was aware of the sexual abuse, but that she did not notify an authority enumerated in § 903.

As a result of several recent, local and national, extremely notorious, matters involving criticism of various allegations of abuse and the failures to report

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knowledge or suspicion of abuse of a child, the atmosphere for cases of this nature is toxic. Perhaps that makes any analysis of any case even marginally related to such an allegation even more delicate, and even more precisely constrained to its specific, individual facts. Hence, while the statute certainly controls, the background setting is significant. Here, the background setting is that Appellant, in her capacity of grandmother, was exposed to information coming from one of her daughters-in-law concerning actions of abuse that one of her grandchildren evidently reported, in a manner of a confessional of sorts, to his own mother, who then, as indicated, passed it along to the grandmother.

At that point, there is a diversion of stories regarding the facts. Appellant states that she told the mother of the allegedly abused child about what she had been told, advising the mother to take the allegedly abused children to A.I. duPont Children's Hospital immediately. That individual, who is a former (as a result of a divorce) daughter-in-law, denies that. Even if that latter version is correct, she also testified that she learned of the allegations from her ex-husband, the father of the allegedly abused child, who had advised that both he and Appellant knew of the situation. She, then, testified that she had called Appellant to discuss the matter.

One way or the other, it is clear that, whether or not the information came from Appellant, the parents of all the children allegedly involved were well aware of the situation.

Hence, the undisputed fundamental facts are that any information regarding any child abuse came to Appellant, not by any observation, but by third-hand recitations of some allegations by at least one parent of every child involved: abuser or abused.

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Based on the foregoing testimony, the Board adopted the hearing panel's finding that Appellant was guilty of unprofessional conduct. The decision was based upon the Board's conclusion that, under § 903, Appellant was required to report the abuse, but failed to do so.

STANDARD OF REVIEW

An appeal from an administrative board's final order to this Court is restricted to a determination of whether the Board's decision is free from legal errors, and whether the Board's finding of facts and conclusions of law are supported by substantial evidence in the record.¹ Substantial evidence is that which “a reasonable mind might accept as adequate to support a conclusion.”² It is more than a scintilla, but less than a preponderance of the evidence.³ It is a low standard to affirm and a high standard to overturn. If the record contains substantial evidence, then the Court is prohibited from re-weighing the evidence or substituting its judgment for that of the agency.⁴ Questions of law are reviewed *de novo*.⁵

¹ 29 Del. C. §10142(d); *Avon Prods. v. Lamparski*, 203 A.2d 559, 560 (Del. 1972).

² *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Super. 1981) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

³ *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988) (citing *DiFilippo v. Beck*, 567 F. Supp. 110 (D. Del. 1983)).

⁴ *Janaman v. New Castle County Bd. of Adjustment*, 364 A.2d 1241, 42 (Del. Super. 1976).

⁵ *Anchor Motor Freight v. Ciabattoni*, 716 A.2d 154 (Del. 1998).

DISCUSSION

The Delaware Board of Nursing may impose sanctions, including suspension of licensure, where the Board finds a nurse guilty of unprofessional conduct.⁶ Unprofessional conduct is defined, in part, as conduct that “fails to conform to legal standards and standards of the nursing profession and adversely affects the health and welfare of the public.”⁷

Appellant raises two issues as grounds for reversal of the Board’s decision. Appellant contends that the Board erred as a matter of law in applying 16 *Del. C.* § 903 to her failure to report, because it occurred outside the scope of her employment as a nurse. Consequently, Appellant asserts that since she cannot be found in violation of that reporting statute, the record lacks substantial evidence to support the Board’s finding of unprofessional conduct. Additionally, Appellant argues that the Board’s decision should be reversed because her counsel was ineffective.

This Court now holds that the Board erred in its interpretation of § 903. Appellant did not violate the statute. Without that violation, the record lacks substantial evidence to support the Board’s finding. Because of that, any ineffective assistance of counsel claim is, for these purposes, moot. The decision below is **REVERSED**.

⁶ 24 *Del. C.* §1922(a)(8).

⁷ 24 *Del. Admin. C.* § 1900-10.4.

I. The Board Erred By Applying 16 Del. C. § 903 To Appellant’s Failure To Report Abuse Outside the Scope of Employment.

The State’s complaint alleged that Appellant failed to report known incidents of child abuse to authorities as required by 16 Del. C. § 903. Failure to comply with the mandatory reporting statute would demonstrate a failure to conform to legal standards, and would therefore serve to sustain a finding of unprofessional conduct. Appellant’s argument, that § 903 does not apply outside the scope of her employment, creates an issue of statutory interpretation. This Court finds that the legislature did not intend that § 903 apply to nurses, at least under the extant familial circumstances, outside the scope of their employment. Accordingly, the Board’s finding of unprofessional conduct cannot be based upon the basis of Appellant’s having violated § 903.

Prior to a 2010 amendment, and while this matter was pending before the Board, § 903 read:

“Any physician, and any other person in the healing arts including any person licensed to render services in medicine, osteopathy, dentistry, any intern, resident, nurse, school employee, social worker, psychologist, medical examiner or any other person who knows or in good faith suspects child abuse or neglect shall make a report in accordance with § 904 of this title.”⁸

⁸ *Hedrick v. Quest Diagnostics Clinical Labs., Inc.*, 807 A.2d 584, 588 (Del. Super. 2002).

In 2010, the legislature amended the statute for the purpose of “clarifying” that the duty to report applies to all persons.⁹ Following the amendment, § 903 read:

“Any person, agency, organization or entity who knows or in good faith suspects child abuse or neglect shall make a report in accordance with § 904 of this title. For purposes of this section, ‘person’ shall include, but shall not be limited to, any physician, intern, resident, nurse, school employee, social worker, psychologist, medical examiner, hospital, health care institution, the Medical Society of Delaware or law enforcement agency.”¹⁰

_____ The Board found Appellant guilty of unprofessional conduct prior to the 2010 amendment to § 903 taking effect. Therefore, that finding should be based upon the standard established by § 903 as it existed prior to the amendment.¹¹ The plain language of the statute, at that time, identified nurses as members of a series of professions mandated to report known or suspected incidents of child abuse.¹² It is unclear if those professionals were required to report incidents of abuse about which they acquire knowledge outside the scope of their employment, stressing, again, that the facts of this case involve the second hand information acquired by a grandmother, where the parents of any victims (and, for that matter, any perpetrators) had knowledge of the same information.

⁹ Del. S.B. 297 syn., 145th Gen. Assem. (2009).

¹⁰ 77 *Del. Laws.* ch. 320 (2010).

¹¹ *See Hedrick*, 807 A.2d. at 589.

¹² 11 *Del. C.* § 903.

“The Court’s role in interpreting a statute is to determine and give effect to the legislature’s intent.”¹³ Where a statute is unambiguous on its face, the Court shall “give effect to its literal meaning.”¹⁵ Where ambiguities exist, the Court must interpret the statute as a whole, giving effect to legislative intent and avoiding absurd results.¹⁶

Title 16’s “Abuse of Children” statutes, in which § 903 (as it stated at the time of the incident herein) is included, are intended to “provide for comprehensive protective services for abused and neglected children by mandating that reports of such abuse or neglect be made to the appropriate authorities.”¹⁷ To that end, the legislation identifies mandatory reporters, reporting procedures and immunity for those making reports in good faith. Any person who makes a report in good faith is entitled to immunity from suit (though, of course, not family repercussions). The immunity provision is not limited to those professionals listed in § 903.¹⁸

_____ “The difference between § 903 and § 908 cannot be viewed as an oversight. The legislature is presumed to have used these different provisions for different

¹³ *Hedrick*, 807 A.2d at 589.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 16 *Del. C.* § 901.

¹⁸ 16 *Del. C.* § 908.

reasons and intended a distinction.”¹⁹ The broad range of immunity, compared to the narrow range of professionals required to report abuse, lead the Court in *Hedrick* to rule that § 903 does not impose a duty to report on persons not listed by the statute. Since the distinguishing feature of a mandatory reporter is occupation, it is reasonable to conclude that reporting is intended to be required only within the scope of that profession, at least in the context of any obligations of a grandmother, when the parents involved are made, or are already, aware.

_____ This interpretation is not inconsistent with other jurisdictions. In Maryland, a statute enumerating a list of professionals as mandatory reporters of child abuse has been interpreted to intend that reporting is mandatory when the mandatory reporter is acting in his or her professional capacity.²⁰ A similar conclusion has been drawn in Florida where a statute requiring “any person” to report child abuse has been interpreted to be intend to mean “any person serving children.”²¹

_____ Appellant’s alleged failure to comply with § 903 cannot be grounds for a finding of unprofessional conduct. She was not acting within the scope of her employment as a nurse in regard to this matter. She was acting within the scope of her role as a grandmother. Since she was not required, because of all the circumstances, to make a report under § 903, her failure to do so cannot serve as grounds for a finding of unprofessional conduct.

II. Without A Violation of 16 Del. C. §903, The Board’s Decision Is Not Supported By Substantial Evidence

¹⁹ *Hedrick*, 807 A.2d at 593.

²⁰ *David N. v. St. Mary’s County Dept. of Social Servs.*, 16 A.3d 991, 996 (Md. 2011).

²¹ *State v. Groff*, 409 So.2d 44 (Fl. Dist. Ct. App. 1982).

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The Board's finding of unprofessional conduct is not supported by substantial evidence, because Appellant in these circumstances was not required to report the abuse under then in force § 903. Although unprofessional conduct does not require the violation of a statute, the Board's decision was based upon a finding that Appellant did not satisfy her statutory duty. The Appellee's complaint and argument focus on Appellant's failure to adhere to § 903. Additionally, the Board's decision highlights Appellant's failure to report the abuse to the authorities listed in the statute. Although the Board also cited Appellant's failure to report the abuse to Nicole Fonseca, Appellant's ex-daughter-in-law and mother of three of the children involved, that point, if accepted, was ancillary to the Board's reliance upon § 903. Any contention that Appellant did not report the abuse to the children's parents is vitiated by the fact that Appellant's son was aware.

According to this Court's finding that § 903 does not apply to Appellant in this context, the violation thereof cannot support a finding unprofessional conduct. Since the Board's decision was based upon a violation of this statute without more, the record lacks substantial evidence to support the finding.

CONCLUSION

_____The Board's decision is **REVERSED**.

_____ **SO ORDERED**.

/s/ Robert B. Young

J.

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oc: Prothonotary
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